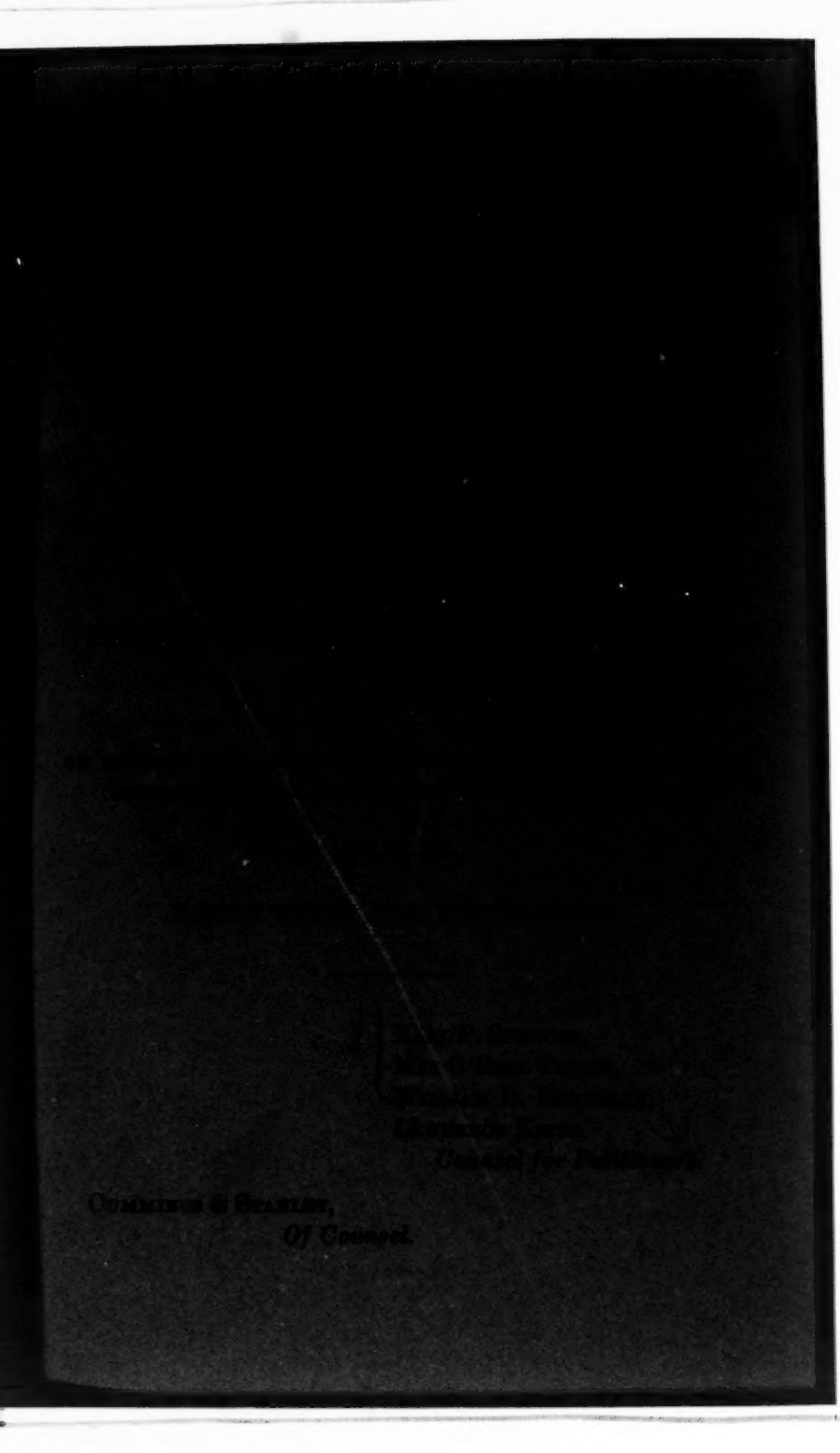

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 640

BAILEY FARM DAIRY COMPANY, ET AL.,
Petitioners,

vs.

CLINTON P. ANDERSON, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

The brief for the Government narrows appreciably and makes plain the nature of the issue as to whether or not the milk order in question violates the requirement of Sec. 8C(5) of the Agricultural Adjustment Act of 1933 as re-enacted and amended.

I

Classification of Milk According to Its Source Is Not Concealed by Terming It "Allocation."

Sec. 8C(5)(A) provides that orders shall contain

> "one or more of the following terms and conditions, and * * * no others.

> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay."

The Government recognizes (p. 7) that only the producer milk is subject to the pricing provisions of the order. Classification is pertinent only in the determination of price and it is therefore classification of the producer milk that is the end objective.

The Government's argument on this point amounts to no more than a rather obvious attempt to confuse measurement with classification.

It contends (p. 7) that:

> "The order provides that all milk received by handlers shall be classified in Class I or Class II according to its use (Sec. 903.3)."

and the Government appears to deem the statute satisfied if some milk—handlers' or otherwise—is classified in accordance with use, for it asserts (p. 7):

> "It follows that all of the handler's milk is classified according to use."

But the Government implicitly recognizes that after all the object and the problem is only to classify the milk of the producers. It says (p. 7):

> "But since only part of the milk classified—the producer milk as distinguished from the outside milk—is subject to the pricing provisions of the order, it is necessary to determine what portion of the total quantity of milk in each use classification will be regarded as producer milk. Some system of allocation is necessary. The question presented in this case, therefore is not whether the milk is classified according to use, which it indisputably is, but whether the method for

allocating the producer milk as between the two classes is reasonable" (Emphasis supplied).

Yet by resort to the euphemism, "allocating," it thus attempts by rather shabby circumlocution to deny that the producer milk is classified within the meaning of the Act. Of course, the question is not whether the classification of producer milk as Class I is reasonable; the question is whether such classification of producer milk is "in accordance with the form in which or the purpose for which it is used" as required by the statute.

In effect the order makes two separate and distinct "classifications":

1. All milk *sold by the handler* is classified as Class I or Class II according to its use;

2. 95% of all milk *sold by the producers* is classified as Class I—not according to its use—but because it comes from the producers.

The first classification serves merely as a quantitative limitation on the amount of producer milk permitted to be classified as Class I. But plainly the statutory requirement that milk be classified only "in accordance with the form in which or the purpose for which it is used" is violated by an order classifying 95% of milk sold by producers as high priced Class I merely because it is producer milk. Neither can such classification and violation be obscured by the fact that all of the milk sold by the handler *is* classified according to its use. The statute does not permit that an order including a term classifying milk be a term "classifying *some* milk in accordance with the form in which or the purpose for which it is used." It requires that if an order includes a term classifying milk then all classification of all milk covered by the order be on that basis. The Government does not question that construction.

As Bentham long ago said: "Error is never so difficult to discern as when it has its root in language." But it would seem fantastic, were it not for the decision of the Court below, to believe that the fact of classification of producer milk as Class I milk for the single reason that it is producer milk may be lightly concealed and justified by saying that the process is not classification but allocation. The same attempt to call a spade a shovel is apparent in the Government argument (p. 10):

> "It should also be noted that the proration method of allocation and the method of allocation adopted in the present order have the same relation to the so-called 'source' of the milk. Under both methods all the milk received by the handler is first classified according to its use and then the amount of milk in each classification is *apportioned* between producer milk and outside milk. One method of allocation is no more a classification according to source than is the other." (Emphasis supplied.)

Obviously the so-called "allocation" of producer milk to each class is a classification of the producer milk and when that "allocation" or "classification" is based, as the Government admits it is, not pro rata, but upon the assignment of 95% of the producer milk to Class I merely *because it is producer milk* then it is plain that the milk of the producers is classified only because of its source.

The utter lack of rationality in the argument of the Government is disclosed if we apply its reasoning to some more obvious "allocations":

If by the laws of Georgia voting eligibility of Negroes were determined only by age classification, then determination of the number of all residents in Class I, twenty-one and over, and in Class II, those under twenty-one, would be simple by resort to census. And thereafter, under the Government's theory it would not be classification other

than by age but perfectly proper to "allocate" 95% of residents of African descent to Class II. To paraphrase the Government's argument (Br., p. 7):

> "Some system of allocation is necessary. The question presented in this case, therefore, is not whether the residents are classified according to age, which they indisputably are, but whether the method of *allocating* the negro residents as between the two classes is reasonable."

Again, admission to the Medical School of Harvard University might be required to be determined solely by classification of all applicants by a competitive examination according to grades, admitting those in Class I having a grade of 80% or higher and rejecting those having less than 80%. Under the Government's theory classification by this sole requirement would not be violated if thereafter all applicants whose name ended in "stein" were "allocated to Class II." The classification requirement, so the Government argues, was complete and satisfied when on the basis of marks in the competitive examination the total number in each class was determined. The subsequent discrimination resulted merely from "allocation."

Again a statute requiring classification of all citizens of New York City only in accordance with their membership or non-membership in the Communist Party would, under the Government's theory, be satisfied once the census determined the total number of those avowing and of those disavowing such membership. And if thereafter 95% of the Catholics in New York City were by name "allocated" to the Communist Party there would result no breach of the requirement that the classification be only in accordance with membership *vel non* in the Communist Party.

The fallaciousness of the argument of the Government, once the true meaning of the words are considered, is obvi-

ous. In spite of the resort to "allocating," "apportioned" and "assigning," to respond to these words as if they were symbols of something other than the fact "classifying" is to revert to primitive and verbal magic.

The question here is not one of interpretation of the language of Section 8C (5) (A). The Government does not quibble that it prohibits classification of milk except in accordance with use. It is difficult enough for the layman to accept judicial decision that the seemingly plain language of a statute means something else. Such rulings, however, are accepted as constructions by those skilled in the law. When, however, the Government seeks by euphemism to deny overt violation of the unambiguous command of a statute although the facts are plain to all, then reason rebels and a position so at war with common sense can tend only to breed disrespect for exercise of all Governmental authority.

Petitioners are not one of the more vigorous minorities who are able to focus public attention on the infringement of their rights. Petitioners rely on the exercise of the reasoned judgment of the members of this Court.

II

Respondent's Purported Avoidance of the Proration Principle of the Act Is a Distinction Without a Difference

The Government asserts that the provisions of Sec. 8c (5) (B) (ii) and 8c (5) (F) do not establish proration as an appropriate part of classification of producer milk in the St. Louis area because those provisions

> "deal with prorating the total value of milk or its proceeds and have nothing to do with proration of commingled milk." (Gov't Br. p. 9)

If this means what it seems to say the Government is asserting that so far as application of the proration principle is concerned there is a difference between:

1. Paying a uniform price per hundredweight to producers in a market-wide pool where such price constitutes an average weighted according to the several uses of all the milk sold in the market; and

2. Paying a uniform price per hundredweight to producers in an individual handler's pool where such price is an average weighted, not according to the several uses of all the milk sold in the market, but weighted according to the several uses made of the milk by the individual handler.

Of course each method prorates (i.e. "divides or distributes proportionately" (at least Websters' International Dictionary so defines "proration")) to each producer the total sum to be paid to all producers as so determined, and necessarily this method in each instance assumes that each producer contributed milk having values for the several uses in the same proportion or ratio that was found to obtain for all the milk in the market-wide pool or in the handler pool respectively. Thus, again, a little common sense in analyzing what is said in the Government brief shows that the Government relies on a distinction without a difference.

A proration of the total value of all the producer milk inherently assumes that the value of each pound of one producer's milk is equivalent to the value of each pound of another producer's milk. Value depends upon use. It must follow that in prorating the total value of milk or its proceeds, the Act is likewise requiring a proration of the several usages of the total to determine the usages of the milk of an individual producer or of any segment of all the producers. It is significant that Sec. 8c(5)(B) requires the payment of "uniform prices" to producers and does

not specify whether uniformity is to be achieved by proration of total value or of the totals in the several classes. To do so would be vain since computation of price in either event would yield the same result, the difference lying only in the order in which the mathematical operations of the computation are performed. The Government's distinction amounts to nothing more than a choice as to the order. Whatever the order, the Act in each of the sections above referred to does clearly embody the principle of proration.

III

Authorized Differences in Terms of Orders Based on Regional Differences in Production and Marketing Do Not Include Terms Violative of the Act.

The Government relies on Sec. 8c(11)(A), (C) as authorizing regional differences in terms. All this provision means is that the Secretary may fix prices in one market, e. g., Kansas City, different from those fixed in another market, e. g., St. Louis; may have two use classifications of milk in one market and four use classifications in another, etc. The provision does not mean that prices may be uniform to producers in Kansas City and not uniform to producers in St. Louis, nor does it mean that milk may be classified by "use" in Kansas City and "source" in St. Louis. The meaning of statutory language must be observed in framing provisions in all regional orders. Milk imported from Chicago classified as fluid milk by the Chicago order, and used as fluid milk in St. Louis, cannot then be classified as butter by the St. Louis order under authority of Subsections 8c (11)(A), (C). Terms in different orders may differ in some respects but they must still comply with the language in Section 8c(5) of the Act.

Although Section 8c(5)(G) does not define "production area," the section applies to "milk . . . produced in

any production area." There can be no proper claim that this language is so narrow as to exclude from the statutory prohibition any milk not produced by St. Louis. The fluid milk imported by appellants is approved milk permitted by St. Louis health authorities to be used for all purposes for which producers' milk is used (R. 264, 219).

The statement in the Government's brief that minimum producer prices fixed for regional market "are not to be condemned merely because these prices make it less profitable, or unprofitable, for handlers subject to the order to purchase outside milk" ignores the indirect but none the less real prohibitory effect on importation of milk from other areas, a result directly opposed to the manifest purpose of Sec. 8c(5)(G).

Conclusion

It is respectfully submitted that the administrative violation of the unquestioned mandate of the statute is so clear as to require the interposition of the jurisdiction of this Court.

December, 1946.

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